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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 861

UNITED SERVICES AUTOMOBILE ASSOCIATION,
PETITIONER,

versus

KATHERINE HARMAN, *et al.*, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

and

BRIEF IN SUPPORT OF PETITION FOR WRIT.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

and

BRIEF IN SUPPORT OF PETITION FOR WRIT.

To the Honorable the Supreme Court of the United States:

Petitioner, United Services Automobile Association, a corporation, respectfully shows:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This is a consolidation of two suits, one brought by Katherine Harman Martinson (formerly Katherine Harman), joined by her husband, and the other by Elizabeth

Amend Keegan (formerly Elizabeth Amend), joined by her husband, they being tried in the District Court of Bexar County, Texas, and treated throughout as one suit. The almost identical petitions (R. 1, 14) seek enforcement against petitioner, as the automobile liability insurer of Lieutenant Daniel Parker, of the several default judgments separately procured by the respondents in Maryland state courts against Oliver F. Lawther, who was alleged to be the extended coverage insured under Parker's policy, on account of personal injuries claimed to have been received by these ladies in an automobile collision with Lawther, while he was driving Parker's car, in Baltimore, Maryland, on April 11th, 1937.

This suit resulted in judgment awards for the several respondents against petitioner, for $5,756.20 in the Harman and $5,848.75 in the Amend action. (R. 140-1). These awards are based solely (1) upon Parker's automobile liability policy with petitioner (R. 92), (2) upon findings of the jury (R. 131-3) that Lawther was driving the car at the time of the collision with the express and implied permission of Parker within the coverage of said policy, and (3) upon the Maryland default judgments (R. 50, 68) in the amounts named as determining Lawther's personal liability for the alleged injuries; neither negligence nor damages being otherwise alleged or proven in this suit. The Maryland default judgments in turn are founded solely upon substituted service on Lawther (R. 43-4, 45, 47-8, 63, 64-6, 66-7), as a *"non-resident"* operator of a motor vehicle, in accordance with Section 190A of the Maryland code.

Section 190A of the Maryland code, which was in effect at the time of this collision and these Maryland judgments, provided for judgment by default against a *non-resident* operator of a motor vehicle in an action growing out of a collision, on the basis of regular personal service of process

upon the Secretary of the State of Maryland and notice to the defendant of such service by registered mail; the acceptance of the rights and privileges of using Maryland highways by the non-resident's operation of such vehicle thereon being declared the equivalent of an appointment of said officer as attorney for the purpose of service of process and the signification of the defendant's agreement thereto. (R. 96-8).

At the same time Section 153 of the said Maryland code provided for personal service of summons by actual delivery thereof by the sheriff, for the purpose of personal judgment (R. 124), generally, and Section 28 of the code authorized service of civil process on government reservations as a condition of their cession. (R. 126-7). Finally, Section 190 of that code specially excepts from its operator's license exemption of non-resident operators "non-residents of this state who have temporary residences in this state for periods in excess of three months in any year." (R. 99-100). These four sections are set out in their relevant parts in the Appendix hereof, as well as Section 182 (R. 127-8), stating only exceptions to personal service.

The undisputed facts affecting this substituted service are as follows:

(1) Oliver Lawther was domiciled, when he first enlisted, in Texas, and when the collision occurred, in Oklahoma; being a minor living with his parents when he went into the service (R. 111-2), becoming 21 on August 24, 1937 (R. 113), and his parents moving to Oklahoma in 1935 (R. 117), the collision being April 11, 1937. (R. 93-4).

(2) He was a soldier in the service of our country, stationed at Fort Hoyle, Maryland, from about October, 1935, through the date of the automobile collision in question on April 11, 1937, and through the times of all the proceedings had in the Maryland courts in both actions, and until about October, 1939 (R. 109-11, 82-3, 93);

(3) At the time of the collision Lawther was exercising the rights and privileges of using Maryland highways by virtue of having purchased a Maryland operator's license in compliance with the requirements of Section 190 and other provisions of the Maryland law, and was driving a Maryland licensed automobile (R. 110, 106, 122, 116-7);

(4) He was not served personally with any process, but was served only in the manner provided for by Section 190A (R. 115-6), viz., by actual service on the Secretary of State and notice thereof to him by registered mail;

(5) Throughout the time following the collision and until October, 1939, he was actually physically present at Fort Hoyle, Maryland, and could at any time have been found there for purposes of personal service of process (R. 117, 111), as provided for generally by Section 153 of the Maryland law and as specially authorized on government reservations by Section 28 thereof (Appendix, p. VIII).

This judgment, on petitioner's appeal, was affirmed by the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas (R. 153), and writ of error was dismissed by the Supreme Court of Texas (R. 176), without opinion.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of U. S. C. A., Title 28, Chapter 9, Section 344 (b), as amended by the Act of February 13th, 1925, Chapter 229, Section 1. In this cause a final judgment has been rendered by the highest court of the State of Texas in which a decision could be had, where certain rights were specially set up and claimed by petitioner under the Federal Constitution, as hereinafter shown.

The manner in which the Federal questions sought to be reviewed were raised, the method of raising them, and

the way in which they were passed upon by the several courts below are as follows:

1. In the trial court respondents pleaded the Maryland default judgments fully (R. 1-5, 14-8), and petitioner filed a general denial thereof (R. 28, 30). Upon the trial petitioner duly urged its motions to strike the Maryland judgments and for a peremptory instruction (R. 129, 130), and later its motion for judgment non obstante veredicto (R. 134), and finally its motion for new trial (R. 141), all on account of the invalidity of the Maryland default judgments sought to be enforced against petitioner, it being asserted that the rendition of these judgments against Lawther when he was an actual resident of Fort Hoyle, Maryland, throughout the period of the automobile collision and the ensuing suits in Maryland, constituted (1) a deprivation of his property without due process of law, and (2) a denial to him of the equal protection of the law, both as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States. These several motions were by the trial court duly considered and overruled, with exceptions noted by petitioner. (R. 131, 136, 142). The trial court rendered no written opinion, and its judgment is found in the Record on page 137, and petitioner's notice of appeal on pages 142-3.

2. By its Points 12, 13 and 8 (R. 149, 147) under its First, Second and Third Propositions (R. 143) in its Brief for Appellant in the Court of Civil Appeals, petitioner duly urged that the trial court erred in overruling and in not sustaining its (1) motion for peremptory instruction, (2) motion to strike from the evidence the Maryland judgment records, and (3) motion for judgment non obstante veredicto, all for the reason that the Maryland default judgments were void for want of jurisdiction over Lawther on account of their constituting (a) a deprivation of his property without the due process of law provided for him by

Section 153 of the Maryland code, and guaranteed to him (as well as those bound through him) by the Fourteenth Amendment of the Federal Constitution, and (b) a denial of the equal protection of the laws of that state (Maryland), particularly Section 153, in the matter of personal service of process, with that enjoyed by other residents of Maryland, in violation of the Fourteenth Amendment of the Federal Constitution; and that Lawther already having paid for the right to use the Maryland highways, Section 190A could not impose as a valid condition of his continued use a constructive appointment of a state officer for the purpose of substituted process. In addition, petitioner duly protected its contention that Section 190A did not apply to an actual resident of Maryland, such as Lawther.

3. The Court of Civil Appeals, to which petitioner duly perfected its appeal, affirmed this judgment on April 30, 1941. (R. 153). In its opinion, which is not officially reported (151 S. W. [2d] 609; R. 153-7, Appendix, pp. I-V), that court does not in direct terms overrule petitioner's said basic propositions, nor in so many words mention petitioner's claim of violation of the Federal Constitution, but denies, in substance and effect, the rights herein specially set up and claimed by petitioner under the Federal Constitution by interposing a non-federal ground of decision having no fair support, thereby giving jurisdiction to this Court. *Ancient Egyptian Arabic Order, etc. vs. Michaux*, 279 U. S. 737, 745; *Ward vs. Love County*, 253 U. S. 17; *Norris vs. Alabama*, 294 U. S. 587, 589; *Lawrence vs. Mississippi*, 286 U. S. 276, 282. Such non-federal ground of decision is that Section 190A is to be construed as including within its substituted service provision a soldier (to-wit, Oliver F. Lawther) in the United States Army, having his residence and actual place of abode at Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland

suits and judgments. Apparently, this construction is founded mainly upon the fact of a soldier's military station being controlled by the government, in connection with the erroneous theory that the ordinary and even necessary meaning of the word "residence" involves the element of intention. This construction appears to be founded further upon the fact that this particular soldier, like most others, actually resided upon a military reservation (Fort Hoyle, Maryland), where the Federal government had full and complete jurisdiction, though, as admitted in the Court's opinion, "when the State of Maryland ceded to the Federal government the ground upon which Fort Hoyle was established, it (Maryland) reserved the right to go upon the reservation for the purpose of serving process," thereby referring to several sections of the Maryland code, of which Section 28 (Appendix, p. VIII) is fully representative. Obviously, if this construction of Section 190A is wrong, then it must follow that the rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, were unwarranted by law and constituted violations of the Fourteenth Amendment of the Constitution of the United States. Furthermore, the mere affirmance by the Court of Civil Appeals of the judgment of the trial court, essentially founded upon the Maryland default judgments in respect to both negligence and damages, was in substance and effect a denial of these rights claimed by petitioner under the Federal Constitution. The decision of these federal questions was necessary to a determination of the cause and the judgment as rendered could not have been given without deciding them. *S. W. Bell Telephone Co. vs. Oklahoma,* 303 U. S. 206.

4. The reasons why the construction given by the Court of Civil Appeals to the word "non-resident" as used in Sec-

tion 190A is plainly wrong, are: (1) "Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place, and also an intention to make it one's domicile" *(Pecos & N. T. Ry. Co. vs. Thompson,* 106 Tex. 456, 460, 167 S. W. 801; *Watts vs. McCloud,* 205 S. W. 381; *Major vs. Loy,* 155 S. W. (2) 617, 621; *Harrison vs. Harrison,* 84 Atl. 57, 58, 117 Md. 607; *Douglas vs. N. Y. H. Ry. Co.,* 279 U. S. 377; *Fisher vs. Jordan,* 116 Fed. (2) 183 [C. C. A.—5th Cir.—Tex.]; *Rawstorne vs. McGuire,* 192 N. E. 294, 265 N. Y. 204; 19 *C. J.* 395; 54 *C. J.* 702); and (2) the only sensible purpose for Section 190A of the Maryland law, as well as for the more or less uniform laws throughout the country providing for substituted service on non-resident motorists in case of automobile collisions, is to prevent a transient from escaping the penalties of a personal judgment by going to another state, and to avoid requiring the injured party to pursue him by suit there, with attendant disadvantages and increased expense; in other words, the physical fact of inaccessibility to ordinary personal service of process for purposes of personal judgment is the evil intended to be remedied, so that the word "non-resident" as used in these laws should be construed in its ordinary sense, thereby excluding Lawther, as one having his actual residence within the State of Maryland *(Suit vs. Shailer,* 18 Fed. Supp. 568, 571 [Md.]; *Mann vs. Humphries' Adm'x.,* 79 S. W. [2] 17, 20, 257 Ky. 647; *Uslan vs. Woronoff,* 18 N. Y. S. [2] 222 [affirmed, 21 N. Y. S. (2) 613]; *Bessant vs. P. S. Transportation,* 237 N. Y. S. 689; *McDonald vs. Mabee,* 243 U. S. 90; *Vaughan vs. Love,* 188 Atl. 299, 324 Pa. 276); and, finally, (3) the provision for Maryland's service of process on cession of the government reservation protected the only state right required for ordinary personal service under Section 153, and at the same time prevented the application

of the substituted service provision of Section 190A, in the light of its purpose. *Maurice vs. Worden*, 52 Md. 283, 291. All of these things are fully discussed in petitioner's brief (post, p. 23).

5. Petitioner duly filed a timely motion for rehearing in the Court of Civil Appeals, on May 14th, 1941 (R. 157), and grounds 2, 3, 11, 15, 16, 27 and 38 to 40 (R. 158, 160, 162, 165, 167) of this motion raised the same Federal Constitutional questions as shown in paragraph 2 hereof (ante, p. 5). This motion was considered and overruled on May 28th, 1941 (R. 168).

6. Thereafter, petitioner timely filed its application for writ of error in the Supreme Court of Texas, on June 23rd, 1941. (R. 168). In this application petitioner urged each of the points heretofore mentioned (R. 171-5), and under the next head more fully shown.

7. This application was by the Supreme Court of Texas on July 16th, 1941, dismissed without written opinion and with the notation "W. O. J.—Correct Judgment" (R. 176). This notation means that the Supreme Court deems the judgment of the Court of Civil Appeals to be a correct one, but is not satisfied that the opinion of the Court of Civil Appeals has in all respects correctly declared the law. *Republic Insurance Co. vs. Highland Park Indp. School District*, 125 S. W. (2d) 270, 133 Tex. 545.

8. Petitioner timely filed its motion for rehearing of its application, on July 30th, 1941 (R. 177), and in this motion are embraced all of the five grounds in substance set forth herein under the heading "QUESTIONS PRESENTED" (post, p. 10), there being included therein each of the foregoing Federal Constitutional questions. The Supreme Court of Texas on October 15, 1941, overruled this motion (R. 176), still without written opinion. Under Rule

4 of that court, effective March 1, 1939, "a motion for rehearing of an application may be filed *as a matter of right.*"

9. "By the action of the Supreme Court of the State (of Texas, in dismissing the application) the judgment of the Court of Civil Appeals became the judgment of the highest court in the state (within the purview of Section 344[b]) to which the case could be taken", and hence this writ of certiorari properly runs to the Court of Civil Appeals. *Sullivan vs. State*, 207 U. S. 416, 422.

10. The grounds upon which it is contended that the Federal questions involved are substantial are, as a matter of convenience, set out under the heading "REASONS RELIED ON FOR ALLOWANCE OF THE WRIT" (post, p. 13).

QUESTIONS PRESENTED.

Federal Questions:

(1) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a denial to Lawther (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland (Sec. 153) in the matter of personal service of process with that enjoyed by other residents of Maryland, in violation of the Fourteenth Amendment of the Constitution of the United States, in that it put a penalty upon his being in the service of his country and made a discrimination against him and all other soldiers subject to the will of the United States government in the matter of military station, although they are actually stationed, resident and available to service of process in the ordinary way.

(2) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a depriva-

tion of his property (as well as the property of petitioner, sought to be bound through him) without due process of law in the matter of personal service, as provided for by Section 153, which is guaranteed to him (and to petitioner) by the Fourteenth Amendment of the Constitution of the United States.

(3) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a deprivation of his property (as well as the property of petitioner, sought to be bound through him) without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, in that Section 190A when thus applied imposed as a condition of Lawther's continued use of the highways of Maryland a constructive appointment of a state officer for the purpose of substituted process thereunder, although Lawther for more than three months before the collision occurred had already bought and paid for the right to use the highways of Maryland as a resident Maryland licensed operator, driving a Maryland licensed automobile.

(4) The rendition by the Maryland courts of the default judgments against Lawther, based solely upon substituted service under Section 190A, constituted a denial to him (and to petitioner, sought to be bound through him) of the equal protection of the laws of Maryland with that enjoyed by other residents of Maryland who, like Lawther, had long before the collision occurred bought and paid for the right to use the highways of Maryland as a resident Maryland operator, driving a Maryland licensed automobile, in violation of the Fourteenth Amendment of the Constitution of the United States.

Non-federal Questions:

(5) Section 190A is not to be construed as including within its substituted service provision a soldier in the United States Army having his residence and actual abode on the government reservation at Fort Hoyle, Maryland, throughout the period of the collision and the subsequent Maryland suits and judgments:

(a) Because the word "non-resident" in its ordinary and primary meaning refers to absence of bodily presence in a given place, and does not involve any element of intention or absence thereof (see authorities under 4 (1), ante, pp. 7-8);

(b) Because the only sensible purpose for this law, as well as like ones throughout the country providing for substituted service on non-resident motorists in case of automobile collisions, is to prevent a transient from escaping the penalties of a personal judgment by going to another state, and to avoid requiring the injured party to pursue him by suit there, with attendant disadvantages and increased expense; in other words, this law is the child of necessity (see authorities under 4 [2], ante, p. 8);

(c) Because the fact of Federal jurisdiction on this government reservation is utterly immaterial as affecting a resident thereof, who is subject to the usual personal service of process, as provided for in Section 153, by virtue of the reservation in Section 28 of the right to serve process within such government area. *(Maurice vs. Worden,* 52 Md. 283, 291);

(d) Because the construction given Section 190A by the courts below would render it unconstitutional, for the reasons shown above.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

1. In sustaining the right of the respondents to recover herein the state courts necessarily determined the several Federal questions above shown, and even though they denied the claimed constitutional protection on non-federal grounds, those grounds, as above shown (ante, p. 7), are too unsubstantial to justify an avoidance of constitutional obligations. *Lawrence vs. Mississippi*, 268 U. S. 276, 282.

2. These Federal constitutional questions are themselves questions of substance, not heretofore determined by this Court, except only as indicated in principle in the case of *Hess vs. Pawloski*, 274 U. S. 352, 356-7, wherein the Massachusetts law, more or less substantially like the Maryland law here involved (Section 190A), was upheld by this Court because "in advance of the operation of a motor vehicle on its highways by a non-resident, the state may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use" and "having the power so to exclude (a non-resident until such formal appointment), the state may declare that the use of the highways by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served". But can such an appointment be justly implied when "the use of the highways" has been bought and paid for by persons "who have temporary residences in this state for periods in excess of three months in any year" (as provided for in Section 190, Appendix, pp. VI-VII), and who have local automobile and operator's licenses? And can such sustituted process bind soldiers actually resident in army camps within a state when they are there amenable to ordinary personal service, and such service is required in order to bind other residents?

3. Under the law of Maryland, ordinary due process of law requires personal service of process for a valid judgment in personam. Section 153 (Appendix, p. VII) ; *Wilmer vs. Epstein*, 81 Atl. 379, 116 Md. 144. "Substituted service in personal actions" "rests upon the necessities of the case, and has always been limited and restricted to cases where personal service could not be made because the defendant was a non-resident, or had absconded or had concealed himself for the purpose of avoiding service". *Bardwell vs. Anderson*, 46 N. W. 315, 44 Minn. 97; *Kitchen vs. Crawford*, 13 Tex. 516, 521. This soldier (Lawther) was actually a resident at Fort Hoyle, Maryland, and there available for personal service for years before the accident, and continuously on through for years after the rendition of the Maryland judgments, and while there he was legally amenable to personal service of process under Section 153, by virtue of Section 28 (Appendix, p. VIII). The Texas courts have therefore decided these Federal questions in a way probably not in accord with applicable decisions of this and other courts.

4. These Maryland judgments were subject to collateral inquiry by the Texas courts for want of jurisdiction over Lawther, and this does not deny to such judgments the "full faith and credit" required by the Federal Constitution. *Adam vs. Saenger*, 303 U. S. 59; *Morehead vs. Bank*, 62 S. W. (2d) 184. (Tex. Ct. C. A.).

5. Although this substituted service statute (Section 190A) is valid and helpful in its appropriate sphere, it has been by the Maryland courts applied in this instance as giving color for the unconstitutional exercise of power by

them in the matter of the rendition of these default judgments, which were accepted by the Texas courts below as res judicata of the fact of liability on the part of Lawther.

6. It is a matter of special importance that United States soldiers on military station should not be discriminated against, simply because they are soldiers, by denying to them the due process of law provided for by statutes like Section 153 of the Maryland code, requiring personal service for judgments in personam, while such right is accorded to all other actual residents of the state.

7. It is a matter of special importance, stressed the more by the present existence of war, that our soldiers in the service of their country on station in the State of Maryland (and, by analogy, away from their homes in any state) be not deprived of their property without due process of law in the matter of personal service provided for by Section 153, and be not denied an equal protection of the law with other actual residents of that state with respect to such personal service of process, when they are equally available and amenable to such process, and have bought and paid Maryland for the right to use its highways as licensed operators, driving Maryland licensed automobiles.

WHEREFORE, your petitioner prays that writ of certiorari issue under the seal of this Court, directed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of said court had in the case numbered and entitled on its

docket as No. 10,944, United Services Automobile Association, Appellant, versus Katherine Harman, et al, Appellees, to the end that this cause may be reviewed and determined by this Honorable Court, as provided by the statutes of the United States, and that the judgment herein of the said Court of Civil Appeals be reversed by this Court, with direction that judgment be rendered in favor of the petitioner; and for such further relief as to this Court may seem proper.

Dated January ....., 1942.

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